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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

BEFORE THE MEDIATOR/ARBITRATOR

In the Matter of the Petition of

NICOLET EDUCATION ASSOCIATION

To Initiate Mediation-Arbitration between said Petitioner and

NICOLET HIGH SCHOOL DISTRICT

Case XVII
No. 28272 MED/ARB 1273
Decision No. 19460-A

APPEARANCES: Foley and Lardner, Attorneys at Law, by HERBERT P. WIEDEMANN, appearing on behalf of the District.

PATRICK A. CONNOLLY, Executive Director, North Shore United Educators, appearing on behalf of the Association.

ARBITRATION AWARD

Nicolet High School District, hereinafter referred to as the District, and Nicolet Education Association, hereinafter referred to as the Association, were unable to voluntarily resolve three of the issues in dispute in their negotiations for a new 1981-83 Collective Bargaining Agreement to replace their expiring 1979-1981 Collective Bargaining Agreement and the Association on June 24, 1981, petitioned the Wisconsin Employment Relations Commissions (WERC) for the purpose of initiating mediation-arbitration pursuant to the provisions of Section 111.70(4)(cm) 6. of the Wisconsin Statutes. The WERC investigated the dispute and, upon determination that there was an impasse which could not be resolved through mediation, certified the matter to mediation-arbitration. On March 15, 1982 1/. The parties selected the undersigned from a panel of mediator/arbitrators submitted to them by the WERC and the WERC issued an Order, dated March 25, 1982, appointing the undersigned as mediator/arbitrator. The undersigned endeavored to mediate the dispute on June 3, 1982, but mediation proved unsuccessful. Pursuant to prior written notice and the agreement of the parties, a hearing was held on the same date at which time the parties presented their evidence. A verbatim transcript of the hearing was prepared and the parties filed post-hearing briefs and reply briefs, the last of which were received on July 23, 1982. Full consideration has been given to the evidence and arguments presented in rendering the Award herein.

THE ISSUES IN DISPUTE

There are three remaining issues "in dispute" between the parties. They are:

I. Fair Share

The Association's proposal for a fair share agreement, like the other two issues in dispute herein, was the subject of a prior mediation-arbitration proceeding and Arbitration Award issued by Arbitrator Joseph

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1/ A portion of the delay between the filing of the Petition and the certification of impasse, was attributable to a Petition for Declaratory Ruling filed by the District on October 9, 1981 and resolved by the WERC on February 12, 1982. Nicolet High School District (Decision No. 19386), February 12, 1982.

B. Kerkman on June 12, 1980. 2/ In that proceeding the Association sought a fair share agreement which would apply to all teachers then employed or thereafter employed by the District. The District, as part of its final offer, proposed a "modified" fair share agreement which would apply to all teachers "who are employed by the Board as of the settlement date and are members of the Association as of that date" and to any teacher who "later signs and submits to the Board a fair share payment authorization agreement." Because the arbitrator selected the District's final offer, a modified fair share agreement was included in the 1979-1981 Collective Bargaining Agreement and said modified fair share agreement became effective as of June 12, 1980.

A. District's Offer. The District, in its final offer, proposes to continue the modified fair share agreement, but would change the wording slightly to reflect that its effective date is June 12, 1980, the date on which the prior agreement was finally settled by Kerkman's Arbitration Award.

B. Association's Offer. The Association again proposes a full fair share agreement, applicable to all employees of the District which it represents. The proposed fair share agreement is similar in many respects to the wording of the current fair share agreement in most other respects, but expands the "save harmless" clause to provide that any defense provided thereunder "shall be under the control of the Association and its attorneys" and adds a statement to the effect that "nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challenging the application or interpretation of this Article through representatives of its own choosing and at its own expense."

II. Arbitral Standard for Nonrenewal

The 1977-1979 Collective Bargaining Agreement, like its predecessor agreement covering 1975-1977, contained no provision dealing with the procedures to be followed in the case of layoffs. The agreement did provide that "no teacher will be nonrenewed except for incompetency, inefficiency, reduction in staff or other good and sufficient reason." Thus, under those two agreements, reductions in staff were accomplished through the nonrenewal process set out in Section 118.22 of the Wisconsin Statutes. 3/ Nonrenewals which were based on alleged incompetency, inefficiency, or other similar reasons, were subject to the Board's determination but could be processed through the grievance and arbitration procedure contained in the agreement. However, the agreement provided that "in the event of arbitration regarding nonrenewal or in the event a nonrenewal decision is challenged through any type of litigation or administrative proceeding, the judgment of the Board shall not be reversed or modified unless it is determined to be arbitrary, capricious, discriminatory, or in bad faith." Because of this latter provision, a determination by the District's Board that a teacher was incompetent or inefficient or that other"good and sufficient reason" existed for the nonrenewal could not be reversed unless it was determined to be arbitrary, capricious, discriminatory, or in bad faith. In the mediation-arbitration proceeding before Arbitrator Kerkman, the Association proposed to change this provision by eliminating that portion which indicated that the decision of the Board could only be reversed if it was determined to be arbitrary, capricious, discriminatory, or in bad faith. The District proposed to retain this provision as it was then worded and since the arbitrator selected the District's final offer the 1979-1981 Collective Bargaining Agreement continued this provision for the term of that agreement.

2/ Nicolet High School District (Decision No. 17581-A), June 12, 1980.

3/ Because the District does not lie entirely within Milwaukee County, Section 118.23 of the Wisconsin Statutes, which requires staff reduction by seniority, does not apply to the District.

A. District's Offer. The District, in its offer for a 1981-1983 Collective Bargaining Agreement, proposes no change in the wording of this provision.

B. Association's Offer. The Association would replace the existing provision dealing with nonrenewals with a provision which reads as follows:

> "Teachers shall be on probation for the first three years of their employment. After three years of continuous and successful full-time employment and upon the gaining of the fourth contract, no teacher shall be disciplined, reprimanded or have his/her contract nonrenewed except for just cause."

In order to clearly indicate its intent that this provision be subject to the arbitration procedure, the Association would reposition an existing paragraph in the article dealing with discipline, which states that "the foregoing provisions" are subject to the grievance and arbitration procedure, so that it immediately follows the reworded provision as well as the other provisions in that article.

III. Layoff Procedure

As noted above, the 1977-1979 Collective Bargaining Agreement, and its predecessors, contained no provision specifically dealing with the procedure to be followed in the case of layoffs. Therefore, reductions in staff were accomplished through the above described nonrenewal provision and the procedures outlined in Section 118.22 of the Wisconsin Statutes. As part of its final offer in the 1979 negotiations, the Association proposed to include a comprehensive layoff procedure in the 1979-1981 Collective Bargaining Agreement. Because Arbitrator Kerkman selected the District's final offer, that proposed layoff procedure was not included in the 1979-1981 Collective Bargaining Agreement and the District's proposal that said provision be continued as it was worded in the prior agreement was implemented as part of the 1979-1981 Collective Bargaining Agreement.

A. District's Offer. The District, in its offer for a 1981-1983 Collective Bargaining Agreement, proposes no change in the wording of this provision.

B. Association's Offer. The Association's final offer in this proceeding includes a comprehensive new layoff and recall procedure, based on seniority within departments. The proposal differentiates between teachers who begin their employment as full-time teachers and those who begin their employment as part-time teachers, allows teachers who are selected for partial layoffs to elect a full layoff, provides for the continuation of certain benefits during layoffs, and provides the normal definitions and procedures normally contained within a layoff proposal. The proposal in question is attached hereto as Appendix A.

DISTRICT'S POSITION:

The District's basic position is two-fold: first the District argues that the Association's final offer should be rejected because it seeks de novo litigation of all the matters resolved just one negotiation ago in a prior med/arb proceeding, and secondly, if reconsideration is to be undertaken, the Association's final offer should be rejected because it has failed to show by "clear and convincing evidence" that there is a special reason for changing the status quo established through prior negotiatons and mediation/arbitration.

The District's position that the Association's offer should be rejected is based on two of the statutory criteria set out in Section 111.70(4)(cm)7., i.e. factor c dealing with the interests and welfare

of the public and factor h dealing with considerations normally or traditionally taken into consideration in voluntary collective bargaining. The District indicates that it knows of no similar case arising under the mediation/arbitration statute but contends that a case arising under the Police and Fire Statute 4/, decided by Arbitrator June Weisberger, rejected the effort of an employer to remove a clause which had been included in the preceding contract pursuant to an interest arbitration award wherein the arbitrator found that the particular provision was not favored by itself but should be included as part of the final package under the interest arbitration statute. According to the District, the Association's position here is weaker because it seeks to include, through relitigation, three provisions which were rejected by Arbitrator Kerkman in 1980. The District argues that, notwithstanding the fact that the Association here has eliminated one of the problems Arbitrator Kerkman had with its proposal in 1980, i.e., the lack of a probationary period, the policy considerations referred to by Arbitrator Weisberger are still valid and applicable under the mediation-arbitration statute. According to the District, if there is no finality associated with the hazards of the final offer selection process and a settlement imposed by a med/arb award is only temporary, the legislative intent of encouraging voluntary settlements will be seriously undermined.

For these reasons the District argues that the Association here should be required to show by clear and convincing evidence, why a change of the status quo, established through collective bargaining and the med/arb process, should be allowed through the relitigation of the same issues. In this regard, the District points out that there is no "complication" in this case, as existed in the Ozaukee case, since the issues being relitigated here are not "paired" with any new issues. For this reason, the District argues that no reconsideration of any kind should be allowed, because it would be unacceptably destructive of the policy goals for which the mediation-arbitration concept was created to serve.

If reconsideration is granted the District argues that the undersigned should demand "a clear and convincing showing of a particularly strong reason for a change in the status quo" with regard to all three issues and that the Association has failed to provide such a showing. Before stating its arguments in this regard, the District first sets out its position with regard to the question of which districts should be considered comparable under the statutory criteria.

Comparables

According to the District, prior fact-finding and arbitration proceedings establish that the appropriate grouping of comparables in the case of Nicolet High School should consist of Nicolet High School and the three elementary "feeder" districts from which its students are drawn. Those districts, Fox Point-Bayside, Mapledale-Indian Hill, and Glendale-River Hills, were given controlling consideration by the arbitrator in a 1978 med/arb proceeding involving Mapledale-Indian Hill School District. According to the District, Arbitrator Kerkman, in that proceeding, did not arrive at his conclusion lightly. Further, the District points out, Arbitrator Kerkman, in the 1980 med/arb proceeding involving Nicolet, again found the same four school group as determinative for comparability purposes. The District points out that in that proceeding the District accepted the four school grouping and the Association "reversed field" and opposed it.

For these reasons the District argues that the prime comparability grouping has now been established and that if the Association cannot demonstrate clear and convincing support for its position on the basis of those comparables, it cannot use comparability as a strong reason in

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4/ Ozaukee County (Sheriff's Department) (Decision No. 17676-A), October 13, 1980.

support of its alleged need to change the status quo.

Fair Share

In its review of the history relating to the inclusion of the current modified fair share provision in the agreement, the District notes that Arbitrator Kerkman reasoned that the fair share proposal was "not a controlling issue" in accordance with his own prior determination in other cases. According to the District, it would be quite inappropriate to disregard the fair share issue now that a fair share provision had been included in the agreement and one party seeks to change the established concept from modified fair share to full fair share, just one contract after modified fair share was initiated. Now that a modified fair share agreement has been initiated, a group of employees have an interest in its continuation, and a switch to full fair share at this juncture is "something which would rarely, if ever occur in voluntary collective bargaining." In support of this position, the District notes that in each of the Milwaukee County districts relied upon by the Association where modified fair share was the form first adopted, modified fair share continues in effect. For these reasons the District argues that fair share should not be deemed a "tag along item of insignificance" but should be considered an important, if not controlling issue in dispute.

Based on the comparables relied upon by the District, the District argues that the score is three to one against the Association since Fox Point-Bayside has no fair share provision and Glendale-River Hills and Nicolet both have modified fair share.

In addition to the alleged lack of prime comparability, the District argues that it is of great significance that the group affected by the modified form of fair share is still very substantial. Eighteen of the original 35 individuals, constituting 15.7% of the total teaching staff, are still employed and have chosen to retain their exemption (9 are no longer employed and 8 dropped their exemption voluntarily). By way of comparison, the District points out that only 6.5% of the Wauwatosa teachers and 4.6% of the West Allis-West Milwaukee teachers were exempted when modified fair share was adopted in those districts.

Finally, in this regard, the District argues that the granting of full fair share will affect the power equation which exists between the parties to this proceeding, particularly since there is a significant number of employees who would not otherwise voluntarily support the Association. According to the District, other arbitrators have held that when the choice is between full fair share and modified fair share, full fair share should only be chosen where substantially all teachers are Union members.

Arbitral Standard For Nonrenewal

Based on its view of the bargaining history of this issue and the layoff issue, the District argues that the provision which it seeks to retain unchanged is "the result of hard bargaining over many years, before the med/arb procedure was added to the Wisconsin Statutes." Citing the testimony in the prior med/arb proceeding before Kerkman, which was made a part of the record herein, the District points out that the current language was not arrived at until the 29th meeting in the 1975 negotiations wherein the Association's proposed "just cause" and staff reduction issues were key items. By reason of this bargaining history, the undersigned should be extremely reluctant to "take away from either party through arbitration proceedings those rights which they have freely negotiated into past agreements," according to the District. It is the District's position that, in interest arbitration proceedings, arbitrators should vigorously avoid giving either party that which they could not have secured at the bargaining table.

The District notes that in the 1980 mediation-arbitration proceeding the Association's final offer on its proposed change in the nonrenewal language was rejected because it did not provide for a probationary period and that this time the Association has included a probationary period. The Association also proposes to change the statement of reasons for nonrenewal to "just cause." According to the District, "good and sufficient reason" and "just cause" really mean the same thing and therefore the question now presented is the same as that which was presented in 1980, i.e., should decisions of the Board be subject to unlimited review or should they be considered final unless they are found to be "arbitrary, capricious, discriminatory, or in bad faith." Because the Association has eliminated the flaw in its earlier proposal, an examination of the comparables is appropriate, according to the District.

Based on the District's evaluation of the comparables, they stand three to one against the Association's position. Only in Glendale-River Hills is there unlimited review in arbitration of school board nonrenewal decisions. At Fox Point-Bayside there is no provision for arbitration and the only possible review is through mediation, according to the District. At Mapledale-Indian Hill there is no provision for arbitration and therefore Board decisions are final under the statute. Likewise, at Nicolet, there currently is no provision for unlimited review through arbitration.

Layoff Procedure

On this issue the District first notes that the arbitrator in 1980 rejected its contention that Glendale-River Hills and Mapledale-Indian Hill should be disregarded for purposes of comparability with regard to the layoff issue since they lie entirely within Milwaukee County and are thus required by statute to reduce staff by seniority. The District accepts said conclusion for purposes of argument in this proceeding but takes issue with the arbitrator's determination that the comparables favored the Association by a two to one ratio. According to the District, this analysis improperly excluded Nicolet from the ratio analysis. Thus, the arbitrator's dicta to the effect that the comparables favored the Association, were it not for the lack of a probationary period in the Association's proposal, was in error and the comparables now, as they were then, are evenly balanced on the question of whether there should be layoffs in accordance with seniority. Thus, according to the District, the comparables do not supply the required clear and convincing showing of a strong reason to change the status quo on staff reduction.

In addition to the alleged lack of support in the comparables, the District identifies a number of "flaws" in the Association's proposed layoff procedure:

1. It fails to accommodate the District's commitment to quality because it would define an employee as "qualified" as being the equivalent of certified if the position requires certification, which is nearly always the case. The other exception provided where layoff by seniority "would jeopardize the continuation of a program involving students" is meaningless, according to the District, because the continuation of a program would never be in jeopardy so long as there was a certified teacher available, regardless of quality. Examples relied upon by the District in support of this contention include the recent contested layoff of an English teacher who was selected for layoff because other, less senior, English teachers had desired specialties which she lacked and the case of the least senior guidance counselor who functions as a multi ethnic counselor but would be subject to layoff since that program would not be jeopardized by layoff.

2. It fails to allow the retention of individuals hired especially for varsity coaching.

3. It is retroactive rather than prospective in its application because, unlike the Association's fair share proposal, it fails to

specify an effective date different than the effective date of the agreement. According to the District, retroactive application would invalidate certain actions, such as the reduction of a full-time reading specialist, which occurred in the spring of 1982, and require the District to redo certain actions taken at that time and possibly incur liability for back pay. Further, if the District were to attempt to initiate layoffs after the implementation of the new procedure but before the spring of 1983, it might generate immediate litigation based on the Association's previously stated intention to demand that all layoffs be made pursuant to the time lines of Section 118.22 of the Wisconsin Statutes, described more fully below.

4. It fails to accommodate the District's promise to department chairpersons that they may return to the bargaining unit if they desire. Since the District has previously promised said chairpersons that they may return to the bargaining unit if they desire and some of those chairpersons have served in nonbargaining unit positions for as many as 12 years, the District argues that its pledge may have created an enforceable right, the violation of which could give rise to legal liability. This potential conflict in contractual commitments could have been avoided, according to the District, if the Association had merely been willing to exclude current department chairpersons from the application of its proposed seniority based layoff concept.

5. It fails to deal reasonably with part-time employees even though the Association is the bargaining representative for part-time as well as full-time teachers. In this regard the District points out that the two feeder districts which have seniority based layoff clauses, both give certain rights to part-time teachers as well as full-time teachers in layoff situations.

6. It will result in litigation concerning the timing of layoffs. In this regard the District acknowledges that under the status quo it must follow the time lines set out in Section 118.22 but argues that the flexibility afforded by the status quo makes this restriction "worth the price." It argues that if the Association's proposal were to be adopted, the District would certainly want the timing to be free from the time restraints under Section 118.22. According to the District, a review of the bargaining history of the proposal in question, as well as the proceedings before the WERC, establish that the Association has never abandoned its position that it may seek to challenge any nonrenewal which does not follow the time lines set out in Section 118.22 of the Wisconsin Statutes, notwithstanding the inclusion of its proposed layoff procedure in the agreement. According to the District, it is not possible to infer, based on the silence of the proposal, that there was no intention to link layoffs with the time lines of Section 118.22 because of that bargaining history and statements of intent. Because the Association's proposal is "fraught with potential for dispute," it should be avoided, according to the District, particularly since the alternative is to readopt preexisting contract language.

Reply to Association Arguments

In is reply brief, the District replies to certain arguments made by the Association with regard to comparability, seniority based layoff, nonrenewal, and fair share. On the question of comparability, the District argues: the Association erroneously contends that the Mapledale-Indian Hill award is not pertinent because it involved salary when, in fact, it involved a number of issues in addition to salary and the arbitrator nevertheless did not feel compelled to consider all of the other districts the Association now suggests are pertinent; contrary to the Association's assumptions, the District is not herein arguing that Nicolet is unique but has, in fact, accepted the four district comparability group now being rejected by the Association, and it is

inaccurate to suggest that Kerkman and Johnson selected the Nicolet area schools in preference to alternative choices presented by the Employer since Nicolet advocated the four school group and the proposition itself suggests that the Association is entitled to whatever comparability group it requests. With regard to seniority based layoff arguments, the District replies: the comments of the two participants in the North Central evaluation are entitled to little or no weight due to the limited exposure of the two participants, and the fact that one of the participants had an apparent conflict of interest as a member of the same parent labor organization and was arguably influenced by the comments of the Association's chief negotiator to other teachers during the pendency of this proceeding; the article dealing with the impact of seniority based layoffs on the performance of public schools, does not support the unqualified endorsement of such procedures, as alleged by the Association and a careful reading of the paper itself establishes that the evidence is limited and somewhat inconclusive the Association's argument that the District's failure to make a layoff proposal constitutes a reason for ignoring the Association's failure to provide seniority rights for existing department chairpersons, suggests that the District should be punished in retaliation for its proposed retention of the status quo, which is illogical and inequitable;, and while the Association seeks to belittle the District's expressed fear of litigation over the timing of layoffs, it has carefully avoided any commitment not to institute such litigation, a fact which did not escape Chairman Slavney's attention in his concurring opinion in the WERC proceeding. In reply to Association arguments on the nonrenewal proposal, the District argues: the Association mischaracterizes the findings of the grievance arbitrator with regard to the nonrenewal referred to in its arguments; the Association implies that the arbitrator found that the District was using evaluations to deliberately rid itself of its highest salaried personnel when, in fact, the arbitrator found no basis for such a finding; the Association's claim that 17 Milwaukee school districts other than Nicolet, provide a cause standard for nonrenewal, is contradicted by its own admission that Nicolet provides a cause standard and ignores the fact that on the real issue, that of the extent of arbitral review, two prime comparable districts are split; and the Association's claim that the final decision of the Board in the Fox Point-Bayside District is subject to review by the WERC as a prohibited practice, is an inaccurate statement of the law. Finally, with regard to the Association's argument that the power relationship between the parties is irrelevant to the question of whether the District should be required to grant a full fair share agreement because of the existence of the mediation-arbitration law, the District argues that "the arbitrator has been around too long to take seriously the protestation that the Employer's concern with Union power is a 'sham'."

ASSOCIATION'S POSITION

The Association's argument is divided into four parts dealing with the question of the appropriate comparable districts, the layoff and recall proposal, the just cause for nonrenewal proposal, and the fair share proposal.

Comparability

The Association contends that its comparables are appropriate and conform to current arbitral opinion, the District's position of being unique cannot be justified according to Wisconsin Statutes, Section 111.70(4)(cm); and restricting the comparables to only the Nicolet feeder schools is merely a "uniqueness concept" in another form.

According to the Association, arbitrators have, with increased regularity, found the 17 suburban Milwaukee school districts relied upon by the Association, to be appropriate for purposes of comparability. In response to its anticipation that the District will argue that the Association should be bound by its position with regard to comparables taken in the Mapledale-Indian Hill arbitration case, the Association

counters that such an argument ignores the type and number of issues in dispute. Thus, if a monetary issue is in dispute, which requires extensive comparisons, the parties may have an incentive to seek to avoid a large group of comparables and thereby eliminate voluminous data from which no clear conclusions can be drawn. On the other hand, if the dispute involves whether the agreement should include a salary schedule or a calendar or a layoff procedure, or just cause for non-renewal, an arbitrator would no doubt feel compelled to examine all of the Milwaukee County districts, according to the Association. In this way he would be certain of the "prevailing working conditions."

According to the Association, if Nicolet is determined to be unique among school districts, such a determination would effectively place the District outside the purview of Section 111.70(4)(cm) of the Wisconsin Statutes. Further, while fact-finder David B. Johnson found in an early decision that Nicolet was unique with regard to monetary issues, such finding does not indicate that he would have so concluded with regard to different issues. Further, Fact-finder Johnson was not bound to give weight to the statutory factors contained within the mediation-arbitration law. On the other hand, Arbitrator Kerkman specifically dealt with the uniqueness in question as it relates to the issues currently in dispute and clearly indicated that he would have erred if he were to dismiss the comparability criteria. Finally in this regard, the Association argues that the claim of uniqueness seeks to avoid the entire mediation-arbitration process, and if allowed in this district, could be used by other districts for the same purpose.

In anticipation that the District will argue that if the District is not found to be unique, comparisons should be limited to the feeder schools, it notes that such argument is based on earlier positions taken by the Association which have not proven to be valid over time. Further, such a finding would create an enclave to support the District's uniqueness concept. It would not square with the broader standards of comparison which are held to be appropriate under the statute and would compare the working conditions of high school teachers to those of elementary teachers while ignoring the radiating affect of Milwaukee on other comparable districts. According to the Association, Kerkman and Johnson's use of Nicolet area schools for comparison purposes was in preference to alternative choices "presented by the Employer" and those choices do not necessarily contradict the choices of other arbitrators in arbitration awards cited and relied upon by the Association.

Layoff and Recall

According to the Association, conditions at Nicolet High School justify the inclusion of seniority based layoff and recall procedures; seniority based layoff and recall procedures are justified by the comparables; and the District's position of offering no layoff procedure is not tenable.

According to the Association, the 1978 grievance arbitration decision involving the nonrenewal of an English teacher, which was introduced into evidence herein, demonstrates the need for a seniority based layoff and recall procedure. It points out that in that case six less senior teachers were retained notwithstanding the arbitrator's statement that the facts in that case raised doubts about the importance of the Employer's claimed need to maintain greater depth and flexibility of staff since "the Union bears a singularly heavy burden under the 1975-1977 standard for reversal language."

The Association also relies upon evidence concerning the layoff of two teachers described in the 1980 arbitration proceeding before Kerkman which, according to the Association, shows that under the existing provision, the District must be sustained on a nonrenewal decision so long as it had any reason, regardless of the merits, for the decision.

The Association also relies on certain comments contained within an evaluation by the North Central Association dated April 6-7, 1982 wherein one evaluator recommends the opening of lines of communication concerning how decisions will be made concerning staff reduction to help improve teacher morale and another evaluator states that teachers "seeing little real influence on decision-making, fearing for job security in a period of declining enrollment and having no established layoff procedure, ... have a morale problem." According to the Association, this report cannot be explained away simply because the latter evaluator is represented by the Association's parent organization since she represented North Central and was supported by the comments of the other evaluator.

The comparables relied upon by the Association, clearly support its proposed layoff procedure, according to its arguments. Thus, of the 27 employment contracts entered into evidence by the Association, all contain layoff procedures except for Fox Point-Bayside and Nicolet High School. Further, of the 17 districts which lie within Milwaukee County, all but Nicolet and Fox Point-Bayside base layoff upon seniority and other objective criteria. In the ten districts lying outside Milwaukee County, three include evaluations along with seniority but even in these districts, seniority is the leading or key factor to be considered. Thus, according to the Association, seniority based layoff procedures are a prevailing working condition for teachers. The same should be said for recall procedures which cannot be overlooked or minimized, according to the Association. All districts relied upon, except Nicolet and Fox Point-Bayside, provide recall benefits.

In anticipation of the District's arguments with regard to an alleged deterioriation in the quality of education, the Association notes that Arbitrator Kerkman stated that he was "unpersuaded that seniority based layoff would deteriorate the ability of the Employer to continue his efforts in this respect." Supporting this finding, the Union points to the study conducted by Richard J. Murnane, Professor, Department of Economics and Institution for Social and Policy Studies, Yale University. According to the Association, that study shows that seniority in and of itself does not cause a deterioration in the public schools. Further, if this argument were accepted, it would be necessary to find that all of the schools which have adopted such a program have suffered deterioration.

The Association notes that even based on the limited group of comparables relied upon by the District, Arbitrator Kerkman found that the comparables supported the implementation of seniority based layoff. The Association points out that Glendale and Mapledale-Indian Hill, both provide layoff and recall based on seniority and certification and that the seniority and procedures are not limited to departments as proposed by the Association at Nicolet.

The Association notes that in the 1980 arbitration, its proposal was found to have a fatal flaw because it failed to include a probationary period and because the arbitrator believed that the Association's proposal contained an unworkable dispute resolution mechanism. Both of those problems have been eliminated. For this reason the Association contends that the situation is now reversed and that the District, by failing to include a seniority based layoff and recall procedure of any kind in its final offer, has taken a fatally flawed position. Thus, since this working condition is almost universally enjoyed by other teachers, the District has placed itself in an unreasonable position. Any claim that the Association is responsible for the District's inability to meet its promise to chairpersons, ignores the fact that the District had every opportunity to bargain and propose the layoff procedure which would have taken into account its promise to those persons. With regard to the District's argument that the arbitrator should award for the District in order to prevent the Association from asserting in

court whatever rights teachers may have under Section 118.22 of the Wisconsin Statutes, the Association argues that this position is based on a number of assumptions. First, this argument presumes that the District will elect to layoff outside the nonrenewal time lines set forth in the Statute. Secondly, it presumes that the courts will not have previously decided this issue. Third, it assumes that the Nicolet Education Association will elect to file such a lawsuit when and if the situation presents itself. Thus, according to the Association, this argument constitutes a "smoke screen" which should be ignored by the arbitrator.

Just Cause for Nonrenewal

The Association contends that District's actions justify the removal of the arbitrary, capricious, discriminatory, and bad faith limitation on the arbitrator's view of a nonrenewal decision and a just cause standard for nonrenewal is justified by the comparables.

According to the Association, the nonrenewal of a teacher's contract is the equivalent of a discharge and arbitral authorities recognize the gravity of such decisions and normally place the burden on the employer to prove guilt or wrongdoing sufficient to justify the decision to discharge. On the other hand, under the existing contractual provision, Arbitrator Gratz recognized that the Association here "bears a singularly heavy burden under the 1975-1977 standard for reversal language."

In support of this argument, the Association points out that in a recent arbitration award, which the District has taken to court, the arbitrator found that the evidence relied upon for a finding of unsatisfactory performance, was "a chimera, mere opinion unsubstantiated by cogent fact." According to the Association, the teacher in question, who had 26 years of experience, was a "dynamic, creative teacher who provided excellent classroom activities." The Association also points out that in that same arbitration proceeding, two witnesses, former long-term teachers who had resigned, testified with regard to their fears that the District was using the evaluation process to deliberately rid itself of its highest salary personnel with a view to reducing its labor costs. According to the Association, the question of whether such fears are groundless is "beside the point," if those teachers held such fears and were prompted to resign in part for that reason.

With reference to its comparables, the Association points out that of the 17 Milwaukee County school districts relied upon, all but Nicolet High School provide a cause standard for nonrenewal. Further, the Association points out that Arbitrator Kerkman found that the comparables should control if they support a particular working condition, regardless of whether that condition is established by statute or contract. Also, two of the three districts relied upon by the District which do not lie entirely within Milwaukee County, both provide for cause for nonrenewal and "tenure by contract." While the Association acknowledges that the District has argued in the past that Fox Point provides that the Board's decision shall be final, the Association takes issue with that position based on its claim that an alleged violation of the cause standard may be considered by the WERC as a prohibited practice case.

Of the ten other districts relied upon by the Association, which lie outside Milwaukee County, only Mequon-Thiensville does not provide cause for nonrenewal. Thus, 25 of 27 districts relied upon provide a cause standard for nonrenewal, according to the Association. The District's position is thus "flawed" with regard to just cause for nonrenewal which is established as a fundamental working condition enjoyed by an overwhelming majority of the teachers in the comparable districts.

Fair Share

In support of its fair share proposal, the Association points out that 9 of the 17 Milwaukee County school districts have a fair share agreement which includes all members of the bargaining unit. Only 7, including Nicolet, have a type of fair share which excludes some bargaining unit members and only one district, Fox Point, has no fair share agreement.

The Association also notes that of the other ten districts relied upon in its grouping of comparables, nine have a fair share agreement which includes everyone in the bargaining unit. Thus, a majority of all possible comparable districts have full fair share, according to the Association.

The Association also proposes to modify the save harmless clause. Its position in this regard is supported by the comparables, according to the Association, because three of the Milwaukee County districts have the same provision and four of the sixteen have no save harmless clause at all. Five of the nine districts outside Milwaukee County which have fair share provisions have the same provision proposed by the Association.

The Association anticipates that the District will argue that it is unfair for a minority to be forced to pay fair share and that a full fair share provision would change the power relationship between the parties. According to the Association, the first question has been dealt with by a number of arbitrators, all of whom have found that fair share is not unfair and is supported by several of the statutory criteria. With regard to the alleged change in the power relationship, the Association argues that under the present mediation-arbitration law, the parties "do not deal with each other from the power relationship" since strikes are not only against the law, they are "out of the question."

The continued exclusion of a group from the fair share provision imposes a greater financial burden on the majority, creates resentment among bargaining unit members, and has no affect on the power relationship because the Association membership is so large in this instance.

According to the Association, its proposed save harmless clause is fair and reasonable since it must have some means to control costs, other districts have similar provisions, and "it is only fair that whoever is paying the freight picks the train."

Reply to District Arguments

In reply to arguments contained within the District's brief, the Association argues that this proceeding is not an effort by the Association to obtain reconsideration of issues lost in a prior arbitration, the District's comparables are not the most appropriate nor do they justify its position on the issues, and certain District arguments with regard to the three issues in dispute are invalid. According to the Association, the issues in the 1980 arbitration proceeding were not identical and the Association lost the decision in that case because of certain "fatal flaws" which have been corrected herein. To preclude the Association from seeking to establish basic working conditions enjoyed by the overwhelming majority of teachers governed by comparable agreements because of this prior award, does not make sense and would forever prevent employees from seeking to establish working conditions which were no longer inferior because of alleged policy goals. According to the Association, these arguments seek to divert attention from the fact that the District offers nothing with regard to the issues in dispute and, instead, relies on its past resistance to these same proposals in support of the status quo. The Association would distinguish the Ozaukee County case on the basis that in that case the Employer was seeking to remove a provision already contained in the agreement rather than the continued exclusion of commonly found rights and benefits which were excluded because of

certain fatal flaws now removed. Further, the Association argues that it has provided clear and convincing reasons for changing the status quo as evidenced by the prior questionable layoffs and the morale problems identified in the North Central study. Nevertheless, the Association argues that the District did not "win" on the merits of its position in 1980, but rather the Association lost because of certain "fatal flaws." For this reason, the Association, which has attempted to make its position more reasonable, should be favored on the merits over the District which has done nothing to change its position.

The Association reiterates its contention that limiting comparisons to the four districts suggested by the District does not conform to current arbitral opinion and runs contrary to the standards for comparison set out in the Statute. According to the Association, the District has misinterpreted the Kerkman Award to mean that he has accepted the four districts as the primary comparables. According to the District, Kerkman accepted those comparables as an alternative to the comparables proposed by the Employer in the Mapledale case and never really concluded that the comparables should be so limited in the 1980 Nicolet case since it was unnecessary for him to do so given his finding that that group supported the Association's position.

Further, the Association argues its position on the three key issues is supported by the comparables, even if they are limited to the three elementary districts relied upon by the District. According to the Association, the District would mislead the arbitrator to the conclusion that the Association's parent organization, North Shore United Educators, is a party to this dispute and has advocated limiting comparables to Nicolet area districts, which is not supported by the record.

On the question of fair share, the Association contends that the fact that modified fair share has been in place for two years is irrelevant except as a "phase in for full fair share." The Association agrees that those who are covered by the modified provision have an interest in this proceeding but argues that their interest is one of avoiding the costs of representation which necessarily are borne by the balance of the bargaining unit. The comparison base proposed by the District is inappropriate and an appropriate comparison base supports the Association. Reason, not power, should govern relations between the parties and the District's contention that fair share should be granted when substantially all of the teachers are union members, begs the question, according to the Association, since the Association would then have no need for full fair share.

On the question of just cause for nonrenewal, the Association contends that the District has presented a slanted view of the bargaining history of this issue. Similarly, the Association argues that the differences in wording contained in the Nicolet area contracts has been used by the District to mislead and divert attention from its failure to make any proposal in this regard.

In response to District arguments with regard to the layoff and recall provision, the Association first argues that the District has again ignored the issue and utilized a "litany of fatal flaws" in the hope that it will again prevail in this proceeding, notwithstanding its failure to make a proposal with regard to seniority based layoff and recall. In response to the fatal flaws set out in the District's brief, the Association argues as follows:

1. The evidence does not support the District's claim that seniority based layoff fails to accommodate Nicolet's commitment to quality.

2. The Association's proposal, which makes no special provision for varsity coaches, is no different from the layoff provisions found in comparable Collective Bargaining Agreements or the provisions of Section 118.23 of the Wisconsin Statutes.

3. The District's claim that the Association's proposal is retroactive is without merit since the Association has never and does not now contend that this provision would have any affect except that which is prospective with regard to future nonrenewals and layoffs.

4. The Association's failure to accommodate department chairpersons is attributable to the lack of any counter proposal from the District and a contrary position would probably have provoked a claim that the Association was seeking to bargain on behalf of managerial employees.

5. The failure of the Association's proposal to grant part-time employees equal coverage is consistent with the treatment of part-time employees under Section 118.23 and the Employer's argument is inconsistent with its argument in 1980 that the Association's proposal was flawed because of the failure to provide a probationary period such as that contained within said section of the Statutes.

6. The District's claimed fear of litigation has no bearing on the merits of the parties' proposals in this case, constitutes a hypothetical situation, and seeks to reargue the case it lost before the WERC.

DISCUSSION

The undersigned agrees with the Association that the fact that the Association sought to obtain these same three proposals in a prior mediation-arbitration proceeding and failed to do so, should not, in and of itself, preclude the Association from ever seeking to obtain said proposals in the future. While the undersigned does not dispute the validity of the underlying policy arguments alluded to by the District, those policy arguments do not necessarily come into play in this proceeding, except in the case of the fair share proposal.

In the view of the undersigned, consideration should also be given to the question of whether the proposals sought to be included in the agreement were found to be unwarranted under the statutory criteria or otherwise without merit and whether there is an existing working condition which was established through selection of the other party's offer or through negotiations. Here the Association's proposals were rejected primarily because of certain "flaws" contained within them, which flaws have now been eliminated. While it is true that there is a long and bitter bargaining history that apparently surrounds the Association's effort to include its job security provisions in the agreement, it is not accurate to say that the result of those negotiations, and prior mediation-arbitration award, established the existing working conditions in this regard. The current agreement does not establish working conditions with regard to job security which exceed those which would flow from constitutional principles (assuming the existence of a property right or liberty interest),or statutory provisions as currently interpreted by the courts. At most, this established working condition treats an annual contract as if it were a property right for constitutional purposes, even though the law may not require that it be so treated in all cases.

For these reasons the undersigned does not believe that the existing lack of any substantial job security provision or layoff and recall procedure should be considered an established negotiated or arbitrated working condition in the same sense that an existing provision, like the fair share provision herein, should be considered. Further, even if the provisions of the 1979-1981 contract are viewed as an established procedure, the Association should not be precluded from seeking to improve those provisions, simply because it was unsuccessful on a prior occasion for reasons that related to alleged "flaws" in its position rather than a lack of merit or justification under the statutory criteria. This is especially true if the continued exclusion of those provisions would appear to fly in the face of prevailing practices in other comparable districts.

While it is true that there may be certain identifiable criteria concerning the establishment of what constitutes a comparable employer for purposes of analysis under the statutory criteria, it is also true that those criteria are all based on relative concepts and do not allow for precise determinations for purposes of all future disputes, regardless of the issues involved. Suffice it to say that the undersigned agrees with the District that the three "feeder schools" have some special comparability to Nicolet, particularly with regard to issues that might be especially influenced by the political complexion of the community or its relative affluence and reliance on State aids. On the other hand, in relation to issues dealing with tenure and job layoffs, it is significant that Nicolet, like only one of the other three districts relied upon by the District, lies partially outside Milwaukee County and is therefore not governed by the provisions of Section 118.23, even though it is near numerous districts that are. Further, the fact that Nicolet is a high school district distinguishes it from the other three districts in a number of ways, such as the need for a departmentally based seniority system, if a seniority based system is to be utilized for purposes of layoffs and recall.

The other districts relied upon by the Association have considerable value as comparables for two of the three issues presented in this proceeding, in the view of the undersigned. This is so primarily because of the fact that they are suburban Milwaukee systems that are influenced, directly or indirectly, by the provisions of Section 118.23. Comparison to these districts is not considered to be of controlling importance on the issue of fair share because of the particular facts surrounding the inclusion of that provision in the agreement, as discussed below.

For these reasons the undersigned has given consideration to all of the comparables presented in this proceeding, but has not attached controlling importance to the comparisons relied upon by the District.

Having thus concluded that the Association's offer should be evaluated under all of the statutory criteria, including the criteria dealing with comparability, and that the comparables relied upon by both parties should be given considerable weight in relation to two of the three issues in dispute, the undersigned will proceed to evaluate each of the issues in dispute before making an overall evaluation of the reasonableness of the parties' total final offers under the statutory criteria.

As a result of the negotiations in 1979 and the mediation-arbitration award rendered in June 1980, the Association has obtained a substantial form of union security that represents a reasonable compromise between the considerations supporting the concept of fair share and the interests of a dissenting minority. For this reason the undersigned agrees with the District that a burden should be placed upon the Association to establish a need for a change in the working condition thus established by the Kerkman Award. According to the comparables, modified fair share is not an uncommon provision in those districts which have fair share. The statistics introduced at the hearing indicate that the process of attrition is working to the Association's advantage and the Association will eventually obtain a full fair share agreement over time. The District raises no specific objection to the Association's proposed expansion of the save harmless clause and the additional verbage probably only clarifies the relationship that would exist even if the language were not changed. On an overall basis the undersigned does not believe that the Association has met the burden of establishing a clear need to change the existing working condition established by the fair share provision contained in the 1979-1981 Collective Bargaining Agreement.

With regard to the Association's proposal dealing with the arbitral standard for nonrenewal, it is significant that the Association has removed the most serious "flaw" in its final offer which was rejected by the arbitrator in 1980. By rewording its proposal, the Association has made the proposal comparable to the standard established by Section 118.23 of

the Wisconsin Statutes and the overwhelming majority of districts relied upon as comparables in its evidence.

The District agrees that the rewording of the proposal, including reference to "just cause," in itself is of no substantive consequence. The crucial issue raised by the Association's proposal is the result that the Board's judgment with regard to just cause would become subject to de novo review by an arbitrator. While the narrow group of comparables relied upon by the District can be considered as arguably unsupportive on this issue, the other comparables relied upon by the Association overwhelming favor the establishment of this working condition. The inclusion of a three-year probationary period is consistent with Section 118.23 and the practice in most other districts. Thus, based on the evidence and arguments presented, the undersigned concludes that the Association's proposal to subject nonrenewal decisions of nonprobationary teachers to de novo arbitral review should be preferred over the District's proposal which would continue the practice of limiting review of all nonrenewal decisions to an arbitrary, capricious, discriminatory, or bad faith standard of review.

While the District points to a number of alleged "flaws" in the Association's proposal, its principal objection to the proposal appears to be the fact that it fails to give sufficient consideration to qualitative judgments as opposed to objective criteria for purposes of layoff and recall. The undersigned does not doubt the sincereity or the depth of concern held by the District in this regard. However, the District's position, which offers virtually no substantive protection from unfair selection for layoff and essentially grants procedural "protections" which exist independently as a matter of Statute, fails to address the legitimate concerns of the teachers that layoff and recall decisions be made fairly and objectively.

The undersigned doubts that the parties would have voluntarily negotiated a provision that failed to give greater emphasis to qualitative judgments, had the District seriously negotiated with regard to the Association's proposal. However, because of the District's strongly held conviction that it must maintain unilateral control over qualitative judgments, no such accommodations were discussed. Further, under the provisions of the mediation-arbitration procedure, the undersigned is not free to fashion a compromise position in this regard.

Because of the District's failure to offer any compromise on this issue during the negotiations, its criticism with regard to alleged "flaws" in the Association's proposal cannot be given great weight. The evidence discloses that in negotiations there was considerable give and take on the other issues in dispute but there was little or no discussion with regard to the Association's proposal on this issue and the other two issues still in dispute. Negotiated layoff clauses are normally the subject of extensive and protracted negotiations, especially when the prospect of layoffs is a reality because of declining enrollments. That process never occurred in these negotiations.

Thus, given the lack of input from the District with regard to changes that would make the layoff and recall procedure more acceptable, and the overall comparability of the Association's proposal to other negotiated provisions in the Districts subject to the direct and indirect influence of Section 118.23, Wisconsin Statutes, the undersigned finds that none of these flaws is sufficient to cause rejection of the Association's proposal. 5/ For these reasons the undersigned concludes

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5/ It is not retroactive and is similar to many other provisions. Were it not for the Association's decision to withdraw the "threat" to attempt to link its proposal to the provisions of Section 118.22, Wisconsin Statutes, the undersigned might be inclined to find that the Association was attempting to withhold what might be viewed as a quid pro quo for a layoff and recall procedure under the decision in Mack v. Joint School District No. 3 92 Wis. 2d 476, (1979) Based on its action in the proceeding before the WERC, the undersigned is satisfied that the Association has severed any linkage with that section of the Statutes which might arguably support the claim that the agreement itself should be interpreted to require compliance with the time lines set out in Section 118.22, Wisconsin Statutes.

that the Association's proposal to include a comprehensive layoff and recall procedure in the agreement should be favored over the District's proposal to continue to accomplish all reductions in staff through the provisions of Section 118.22, Wisconsin Statutes.

Viewing the two final offers in their entirety, the undersigned believes that, overall, the Association's final offer should be preferred under the statutory criteria. While the District's position on the issue of fair share is favored over that of the Association, the Association proposals on nonrenewal and layoff are favored over the District's status quo position on those issues. Further, the nonrenewal and layoff issues are deemed to be of greater consequence than the issue of fair share, and therefore the finding that the Association's position should be favored with regard to those two issues necessarily results in a finding that the Association's final offer should be preferred.

Based on the above and foregoing the undersigned renders the following

AWARD

The Association's final offer, submitted to the Wisconsin Employment Relations Commission, shall be included in the parties' 1981-1983 Collective Bargaining Agreement along with all of the provisions of the 1979-1981 Collective Bargaining Agreement which are to remain unchanged and the stipulated changes agreed to by the parties.

Dated at Madison, Wisconsin this 25th day of August, 1982.

George R. Fleischli
Mediator/Arbitrator

NEW ARTICLE - LAYOFF AND RECALL PROCEDURE

Section 1. Standard

In the event the Board determines to reduce the number of employe positions (full layoff) or the number of hours in any position (partial layoff), the provisions set forth in this Article shall apply.

Section 2. Notices and Timelines

No later than December 1 of any school year, the Board shall develop a seniority list, which shall rank all employes, including both active employes and employes on full or partial layoff, according to their length of service in the District, as determined under Section 3, Step 2 below. Such list shall also state the teaching assignments, if any, presently held by such employes, and the areas in which such employes are licensed.

The Board shall provide preliminary notice in writing to the employes it has selected for reduction under Section 3, Step 2 below. The Board shall provide the employes so selected with an opportunity for a private conference with the Board. After the opportunity for the private conference, the Board shall provide a final notice to those employes it has selected for full or partial layoff prior to implementing any layoff(s).

The Board shall simultaneously provide the Association with copies of all notices it sends to employes under this Section.

Section 3. Selection for Reduction

In the implementation of staff reductions under this Article, individual teachers shall be selected for full or partial layoff in accordance with the following steps:

Step 1 Attrition. Normal attrition resulting from employes retiring or resigning and part-time employes will be relied upon to the extent it is administratively feasible in implementing layoffs.

Step 2 Preliminary Selection. The Board shall select full-time employes or partially laid off employes for a reduction in the department where such reduction(s) are to occur in the order of the employe(s)' length of service in the District, commencing with the employe in such department with the shortest service. Provided, however, that, where the Board determines for just cause that the selection of a particular employe for layoff solely upon the basis of seniority would not be in the best interests of the District because such employe's selection would jeopardize the continuation of a program involving students which the Board wishes to retain or its having a qualified employe for such a program, the Board may exempt such employe from the application of this step and retain him/her in the District's employe while proceeding to layoff

The service of partially laid off employes who have been laid off from full-time employment, shall be considered continuous full-time employment for purposes of this Article.

A leave of absence pursuant to Article XIV of this agreement or part-time employment in conjunction with a leave of not more than one year's duration shall not be deemed a break in an employe's continuity of employment, and the period thereof shall be included in determining the number of full consecutive school years that he/she worked in the District.

Step 3 Refusal of Partial Layoffs. Any employe who is selected for a reduction in hours (partial layoff) under Step 2, and who is not able to retain a substantially equivalent position to that which the employe presently holds, may choose to be fully laid off, without loss of any rights and benefits as set forth in Sections 4 and 7 below.

Section 4. Recall

If the District has a vacant position or a portion of a position available for which a laid off employe is qualified according to the District's records, the employe shall be notified of such position and offered employment in that position, commencing as of the date specified in such notice. Under this Section, employes on layoff will be contacted and recalled for a position within a department in reverse order of their layoff from that department. In the event two (2) or more employes who are so qualified were laid off on the same date, the Board shall select the employe who has the longest service in the District as determined under Step 2, Section 3.

Recall rights under this Section shall extend to employes on partial layoff (i.e., those employes whose hours have been reduced).

Within fourteen (14) days after an employe receives a notice pursuant to this Section, he or she must advise the District in writing that he or she accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice pursuant to this Section shall be mailed by certified mail, return receipt requested, to the last known address of the employe in question as shown on the District's records. It shall be the responsibility of each employe on layoff to keep the District advised of his/her current whereabouts. The Board shall simultaneously provide the Association with copies of any recall notices which are sent to employes on layoff status pursuant to this Section.

Any and all recall rights granted to an employe on layoff pursuant to this Article shall terminate upon the earlier of (i) the expiration of such employe's recall rights period, or (ii) such employe's failure to accept within fourteen (14) days an offer of recall, as provided in this Section, to a substantially equivalent position to that from which the employe was laid off. For purposes of this Article, the term "employe's recall rights period" is three (3) years following the employe's most recent full layoff, the three-year period ending on the first day of the fourth school year after such layoff. Partially laid off employes shall have a continuous recall rights period while on partial layoff.

An employe on full layoff status may refuse recall offers of part-time, substitute or other temporary employment without loss of rights to the next available full-time position for which the employe is qualified. Employes on layoff status shall not lose rights to a full-time position by virtue of accepting part-time or substitute appointments with the District.

No new or substitute appointments may be made by the District while there are employes who have recall rights who are available and qualified to fill the vacancies.

Section 5. Definition of "Qualified"

For purposes of this Article, "qualified" means certified by the Wisconsin Department of Public Instruction at the time the person is to begin the new assignment, if such certification is required by the position. If DPI certification is not required for the position, "qualified" shall mean prior experience in the assignment or position, or, if such experience is lacking, able to perform the assignment in the opinion of the Board.

Section 6. Definition of "Substantially Equivalent Position"

For purposes of this Article, "substantially equivalent position" means:

(a) A full-time-equivalent position which is not less than eight-five percent (85%) of the full-time-equivalent position at which the employe was employed at the time of layoff; and

(b) Insurance benefits equal to those which the employe received at the time of layoff.

Section 7. Benefits During Layoff

Employes who are laid off shall remain eligible for inclusion in all of the District's group insurance programs under the same terms and conditions as are applicable to all regular members of the bargaining unit, during the summer immediately following the employe's layoff notice subject to the rules of the insurance carrier.

No employe on full or partial layoff shall be precluded from securing other employment while on layoff status.

Employes on full layoff will be eligible for inclusion in all of the Districts group insurance programs, to the extent such policies allow their eligibility, provided the laid off employe reimburses the District for the full premium for such coverage. Such eligibility shall continue until the end of the employe's recall rights period except that it shall be suspended while the employe is employed on a full-time basis for another employer.

Employes on full layoff shall retain the same amount of seniority, based upon length of service in the District as set forth in Section 3 Step 2 above, as she or he had accrued as of the date she or he was laid off. If a laid off employe is recalled, such employe shall again begin to accrue full seniority.

Employes on full layoff shall retain the amount of sick leave they had accrued as of the date she or he was laid off, and, if she or he is recalled, shall again begin to accrue sick leave.

Partially laid off employes, who were laid off from full-time employment, shall have all the rights and privileges of full-time bargaining unit members under this Agreement, with the exception of salary (which shall be prorated), shall accrue full seniority while on partial layoffs, as set forth in Section 3 Step 2 above, and shall accrue full sick leave. Insurance benefits shall be subject to the rules of the insurance carrier.

Section 8. Grievance Procedure

If an employe or the Association wishes to challenge the Board's actions in reducing or laying off employes, they may file a grievance beginning at the District Administrator level (Step 3) of the Grievance Procedure under this Agreement, no later than ten (10) working days after receiving final notice of layoff under Section 2 above.

Section 9. Definition of "Department"

For purposes of this Article, a "department" is defined as those teachers who have been grouped together by the District to teach classes related to each other or to perform related professional educational responsibilities.